In The
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-702

EARL EKAS and MARTIN FEURER, JR., On behalf of themselves and all others similarly situated,

Petitioners,

v.

CARLING NATIONAL BREWERIES, INC. and BREWERY WORKERS LOCAL UNION NO. 1010, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDICES THERETO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, EARL EKAS and MARTIN FEURER, JR., on behalf of themselves and all

others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding August 3, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Also included in the Appendix hereto is the opinion of the United States District Court for the District of Maryland of July 25, 1978, from which Petitioner appealed to the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 3, 1979, and this petition for rehearing was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a union and employer have the right to amend their collective bargaining agreement over the express opposition of the employees covered by the agreement.

2. Whether an agreement by a union and

employer to merge bargaining units over the express opposition of one unit of employees conflicts with federal labor policy and the National Labor Relations Act.

STATEMENT OF THE CASE

Petitioners, Earl Ekas and Martin Feurer, Jr. are members of a class of employees ("Beltway employees") employed by Carling National Breweries, Inc. ("Carling National") and represented by Brewery Workers Local Union No. 1010, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union").

For many years the Union has been the representative of employees of various breweries located in Baltimore, Maryland. Prior to 1973, a single labor agreement covered all brewery employees of the breweries represented by the Union in the Baltimore area, including the Carling Brewing Company, Inc. which maintained its brewery on the Baltimore Beltway and the National Brewing Company which maintained its brewery on Dillon Street in Baltimore. Contracts were negotiated on an industry wide basis and jointly ratified by the employees of all the local breweries at a single ratification meeting. In 1973, however, at the behest of

its employees who sought separate representation, the Carling Brewing Company, Inc. withdrew from the multi-employer group and negotiated a separate contract with the Union covering the Beltway employees which provided a different schedule of wages and benefits for them. Each agreement guaranteed the seniority of the employees in their respective units from encroachment by employees outside their bargaining unit. No provision was made in either agreement for dealing with job rights in the event of a merger of operations with any other brewery.

In 1975, the Carling Brewing Company, Inc. and the National Brewing Company merged and became Carling National. The new company continued to operate both the Beltway and Dillon Street breweries, however, and the employees of each continued under the coverage of their respective separate collective bargaining agreements in their separate bargaining units as described above. The only provision ever negotiated in regards to job rights between units was a March, 1976 "Memo of Agreement" which guaranteed jobs opening at the Beltway to laid off employees from the Dillon Street plant, but "as a new employee in the Beltway plant." A number of

laid off Dillon Street employees exercised this right and hired into vacancies at the Beltway plant. They were placed at the bottom of the Beltway seniority roster, consistent with the Beltway employees' contract.

In the Spring of 1978, Carling National announced the closing of the Dillon Street plant and plans to continue operations at the Beltway plant. Although, as noted above, the Beltway collective bargaining agreement was explicit on the protection of seniority rights of Beltway employees, Carling National and the Union entered into a Memorandum of Understanding which provided for a merger of the theretofore separate bargaining units into a single unit to be located at the Beltway plant and the transfer of Dillon Street employees to the Beltway on the basis of the seniority they had accrued as employees in the Dillon Street bargaining unit. According to the terms of the Memorandum of Understanding, the two seniority lists were merged according to length of service in either unit. This would result in displacement of Beltway employees by Dillon Street employees with greater seniority as employment at the Dillon Street brewery included service as an employee at the former National Brewing Company. The

Beltway employees protested to the Union president that the agreement combining the seniority lists was a clear violation of the express terms of their collective bargaining agreement which forbade individuals from outside the bargaining unit to displace unit members. Despite their protests, the Memorandum of Understanding was submitted to a joint ratification meeting of the two plants. The Beltway employees opposed ratification, but they were outnumbered by the Dillon Street employees and the Memorandum of Understanding was accepted.

On behalf of their class, Ekas and Feurer filed suit, seeking an injunction against the implementation of the Memorandum of Understanding; a declaration that the Memorandum was null and void; and an award of damages. The District Court denied relief on August 1, 1978. On August 3, 1979, the Court of Appeals for the Fourth Circuit issued its opinion affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DECIDED IMPORTANT QUESTIONS OF FEDERAL LABOR LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AS TO (1) THE AUTHORITY OF A UNION AND AN EMPLOYER TO MAKE MID-TERM MODIFICATIONS OF A COLLECTIVE BARGAINING AGREEMENT OVER THE EXPRESS OPPOSITION OF THE EMPLOYEES COVERED BY SAID AGREEMENT OR (2) THE MERGER OF RECOGNIZED COLLECTIVE BARGAINING UNITS.

The collective bargaining contract covering the Beltway employees did not give the parties the power to amend the agreement nor provide any formula for resolving questions of seniority in the event that the Beltway operations were consolidated with the operations of another brewery.[1]

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[1]This case must be distinguished from those arising in industry governed by the Interstate Commerce Act. Section 5(2)(f) of the Interstate Commerce Act which governs the ICC's authority over consolidation or mergers in the railroad industry provides that:

"As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. .." 49 U.S.C. §5(2)(f) (Emphasis supplied).

The purpose of this section is to provide mandatory protection for the interests of railroad employees affected by railroad consolidations. Railway Labor Executives Association v. United States, 339 U.S. 142 (1950).

The Court of Appeals ruled, nevertheless, that even in the absence of an express provision to amend, a union and an employer may assent to the modification of the terms of their existing collective bargaining agreement. Here that modification changed existing rights and was finalized despite the wishes of the employees represented under that agreement.

The Court of Appeals relied on Humphrey v. Moore, 375 U.S. 335 (1964) and Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). In neither case, however, did the Court consider the problem posed in the instant matter. In Humphrey v. Moore, for example, a seniority dispute was caused by a merger of two companies in a multi-employer, multi-local union unit. There, however, the collective bargaining agreements of both companies contained clauses providing a joint employer-union procedure for resolving any controversies over seniority resulting from a merger of operations. When the merger occurred, the contract procedure was followed, but one group of employees lost seniority rights and was dissatisfied with the decision. They sought court protection of their seniority rights. The issues were whether the decision in regards to seniority

was within the power of the body making it and whether the union acted fairly by advancing the interest of one group of employees over the other. This Court found that there was the contractual authority to make the seniority decision and further that the union acted fairly.

Most significantly, the Court noted in Humphrey v. Moore:

> "We need not consider the problem posed if (the contractual procedure) had been omitted from the contract or if the parties had acted to amend the provision. The fact is that they purported to proceed under the section." 375 U.S. at 345 n.7.

That is the problem posed by the instant case. The Court now has the opportunity to answer the question. Indeed, a close reading of the majority opinion and concurring opinion of Mr. Justice Goldberg in Humphrey v. Moore, provides the guidance to resolve the present issue. It shows that a union and employees do not have the right to make mid-term modifications which are not authorized by employees covered by the agreement. Consider the dichotomy between the majority opinion and by Mr. Justice Goldberg's concurring

opinion. In the latter's view the "multi-employer unit and the union" had the right to resolve the dispute by amending the agreement even in the absence of the contractual authorization. He stated his belief that the power of a union and employer to settle a grievance is not limited by the terms of the agreement; that they are "free by joint action to modify, amend, and supplement their original collective bargaining agreement." 375 U.S. at 353. The majority, however, assumed that the rights of the union and management were circumscribed by the agreement and that the case had to be judged on the decision of the joint conference committee. Thus the majority rejected Justice Goldberg's view that the parties had the right to amend. The High Court found that the committee's decision in Humphrey v. Moore was reasonable in the light of the contractual language and untainted by unlawful union conduct.

Humphrey v. Moore's majority and concurring decisions were analyzed in Price v. International Brotherhood of Teamsters, 457 F.2d 605 (3rd Cir. 1972). In Price, as in Humphrey v. Moore and the instant matter, seniority rights of transferred employees were involved. Like Humphrey v. Moore and unlike the instant case,

the contract in Price included provisions governing seniority issues when one facility of the employer was closed and the work of that facility transferred to another location. As in the instant case, the transferred employees were given seniority rights at their new location which adversely affected the contract rights of incumbent employees at that location. The employees whose rights were adversely affected sued the company and the union and charged a violation of their seniority rights. The District Court granted summary judgment for the defendants, holding that it would not inquire into the resolution of the dispute by the parties, relying on Justice Goldberg's conclusion in Humphrey v. Moore that management and labor have the right to amend or modify their agreements as they see fit. The Third Circuit, however, rejected Mr. Justice Goldberg's view in favor of the "more traditional approach" favored by the majority in Humphrey v. Moore which requires "the parties to operate within the confines of the collective bargaining agreement." More specifically the Third Circuit disagreed with the District Court's rationale in regards to the administration of labor contracts. 457 F.2d at 610. The Court noted three views on

contract administration:

"(1) The collective control approach emphasizes the power of the bargaining parties to control the terms and conditions of employment;

(2) The individual rights approach emphasizes the rights of the employee under the collective bargaining agreement; and

(3) The statutory approach emphasizes the compromise between the first two views struck in Section 9(a) of the National Labor Relations Act." 457 F.2d at 609 n.7.

The Third Circuit acknowledged that Section 9(a) of the National Labor Relations Act gives the union authority as the sole bargaining representative of employees, but noted that this section of the Act recognizes that the individual employee's interest may not always coincide with those of the bargaining representative and thus gives him the right to grieve directly to the employer without the interference of the union. This statutory compromise was seen by the court as Congressional recognition that "unlike bargaining, contract administration was a three-sided affair, with proper protection to be accorded to each set of interest involved." 457 F.2d at 609.

According to the Court's interpretation of the law, the individual employee does not lose "his rights to enforce what he conceived to be his individual interests in the agreement." 457 F.2d at 609. In the Third Circuit's view "(w)hile modification could add to or explain provisions, it could not take away any rights already there," and while the Court acknowledged that it would "defer to arbitrators or committees when they are exercising their delegated power to decide unforeseen or unresolved problems arising out of gaps or content in the contract ... it will not allow them to ignore provisions embodied in the agreement: the basic contract rights must be enforced." 457 F.2d at 610.

Here Carling National and the Union ignored the "basic contract rights" of the Beltway employees. The Beltway agreement provided for departmental seniority and gave Carling National and the union no authority to substitute seniority or some other basis. Clearly they had no authority to rescind the Beltway employees' agreement during its term to the detriment of those who unequivocally opposed any changes in the extant contract.

In Ford Motor Co. v. Huffman, too, the

Court left open the question which is presented here. There, a union and company negotiated a change in their single collective bargaining agreement which gave superior seniority rights to certain World War II veterans at the expense of other employees in the unit. The Court discussed "(t)he public policy and fairness inherent in crediting employees with time spent in military service in time of war or national emergency" and concluded that "(f)rom the point of view of public policy and industrial stability, there is much to be said, especially in time of war or emergency, for allowing credit for all military service. Any other course", said the Court, "adopts the doubtful policy of favoring those who stay out of military service over those who enter it." 345 U.S. at 339, 340. It was in that context, therefore, that the Court concluded that the union and the company had the right to amend the agreement even though some unit employees might be adversely affected. However, the Court specifically stated that it was "not necessary to define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents,"

noting further that "(n)othing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security." 345 U.S. at 342.

No such considerations are presented in the instant case. Rather here the issue is the very issue left vacant by this Court in Huffman - the limits of a collective bargaining representative in accepting proposals to promote the economic welfare of its constituents. Moreover, in Ford Motor Co. v. Huffman, employees in only one bargaining unit and one collective bargaining agreement were involved, while here the rights of employees in one bargaining unit were adversely affected by the intrusion of employees from another bargaining unit represented by the Union.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In addition to the conflict between the Court of Appeals decision here and Price v. International Brotherhood of Teamsters, 457 F.2d 605 (3rd Cir. 1972), the decision here is repugnant to §9(a) of the National Labor Relations Act, 29 U.S.C. §159(a), and conflicts

with the decisions of other courts of appeals, including the Fourth Circuit.

Section 9(a) states, in part:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ..."

In General Warehousemen and Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), the company had operated a facility in Dallas for many years. Its employees were represented by the Teamsters. The company opened a new facility in Denison, Texas (75 miles away), where a second union, the Machinists, had become the bargaining representative. The Teamsters demanded transfer rights for the Dallas employees. The matter was referred to arbitration. The arbitrator ruled that the Dallas employees had transfer rights to Denison with seniority over the Denison employees and the right to

compensation and benefits enjoyed under the Dallas Teamsters agreement - just as the Union and Carling National agreed that the Dillon Street employees had transfer rights to the Beltway with seniority over the Beltway employees. The Court ruled that the arbitration award which allowed an employee to transfer seniority rights to another plant operated by the same employer in derogation of the collective bargaining contract rights of the employees at the other location was unenforceable. Here the Beltway employees had unequivocally expressed their desire and exercised their right under §9(a) to be represented in a unit separate and apart from any other unit of employees in the brewery industry. This assured them "the fullest freedom in exercising the rights guaranteed" by Section 9(b) of the National Labor Relations Act, 29 U.S.C. §159 (b). And since 1973, they had been represented for purposes of collective bargaining in this unit of their choice.

A Memorandum of Understanding of June 23, 1978, which consolidated the previously separate bargaining agreements, destroyed the bargaining unit in which they had chosen to be represented. This action of Carling National and the Union therefore conflicted with the

right of the Beltway employees to bargain collectively, which the courts have recognized is "at the heart of our federal policy governing labor management relations." 579 F.2d at 1293.

The Court refused to enforce the award granting Dallas employees seniority rights over the Denison employees saying: "This is in direct and irreconcilable conflict with the rights of the Denison employees, under NLRA, to be represented by IAM, and, through it, to negotiate and contract for wages and working conditions at Denison ... Indeed, outside control over seniority rights could deny the Denison employees the most valuable of all the rights protected by the negotiating-contracting process, i.e. the job itself." 579 F.2d at 1295, 1296 (emphasis added).

The same is undeniably true here. The agreement between Carling National and the Union is in direct and irreconcilable conflict with the rights of the Beltway employees and their right to negotiate and contract for working conditions at the Beltway brewery. Yet the Court of Appeals here held that the interests of employees outside the unit may be considered along with the interests of employees within the unit. To allow the

rescission of their agreement to stand, would in the words of Circuit Judge Coleman speaking for the Fifth Circuit in Standard Brands: "to an unacceptable degree, interfere with the ... important right of other workers to organize themselves into a union and bargain collectively with their employer." 579 F.2d at 1294.

While it is true that in Standard Brands there were two different unions involved, the principle upon which the Court relied is equally applicable where the same union represents both groups of employees, for it is not the identity of the bargaining agent that is controlling, but rather the sanctity of the separate bargaining units which was at issue. Although that case involved an arbitrator's award the Court was explicit that the same holding would be required if the parties had contracted to give the transferred employees seniority rights, citing the "Steelworkers Trilogy".

The Fifth Circuit relied upon Sperry Systems Management Division, Sperry Rand Corporation v. NLRB, 492 F.2d 63 (2nd Cir.), cert. denied 419 U.S. 831 (1974). There the Second Circuit reversed the National Labor Relations

Board's dismissal of an unfair labor practice charge filed by a company alleging that a New York union was attempting to have its contract applied to a California unit. The reversal was based on the analysis that the wages and working conditions of the California unit were not "a permissible subject of bargaining in the New York City Unit" 492 F.2d at 69.

In Local 7-210, Oil, Chemical & Atomic Workers, International Union, AFL-CIO, v. Union Tank Car Company, 475 F.2d 194 (7th Cir.), cert. denied, 414 U.S. 875 (1973), the Seventh Circuit determined that the National Labor Relations Board's certification of one union at a plant precluded a second union from having its contract with another plant owned by the same employer applied.

In Glendale Manufacturing Company v. Local No. 520, International Ladies' Garment Workers' Union, AFL-CIO, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961), also relied upon by the Fifth Circuit, the Court determined that it would be an unfair labor practice for the employer to deal with a decertified, minority union.

It is submitted, therefore, that the ruling of the Fourth Circuit that the union

need not pursue the Beltway employees' interests to the exclusion of persons outside of the unit serves to split the Fourth Circuit from other Courts of Appeals. This conflict created by the Fourth Circuit must be resolved by the Supreme Court.

CONCLUSION

It is respectfully submitted that the Beltway employees' Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should be granted for the following reasons:

1. The question raised in this case concerning the right of a union and an employer to amend the collective bargaining agreement of a unit of employees against the expressed wishes of the entire unit is a question that shall recur and should be decided by the Supreme Court.

2. The duty of the union to pursue the interests of one unit which it represents to the exclusion of all others is of concern to all labor practitioners. Yet, the Fourth Circuit has rendered a decision in conflict

with that of other Circuits and which leaves the issue open.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 78-1704

Earl Ekas and Martin Feurer,Jr.
on behalf of themselves and all
others similarly situated, Appellants,

v.

Carling National Breweries, Inc.,
a Virginia Corporation
and
Brewery Workers Local Union No. 1010,
affiliated with the International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America,
and
William J. Farley, as the representative of a class of all individuals
employed by Carling National
Breweries, Inc.,
at its Dillon Street Plant, Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued May 7, 1979 Decided August 3, 1979

Before WINTER, BUTZNER and PHILLIPS, Circuit Judges

Edward J. Gutman (Jacob Blum, Rochelle S. Eisenberg, Blum, Yumkas, Mailman & Gutman, P.A., on brief) for Appellants; Leonard E. Cohen (Neal Serotte, Frank Bernstein, Conaway & Goldman, on brief) for Appellee Carling National Breweries, Inc.; Marvin Poe Sklar for Appellee Brewery Local No. 1010.

WINTER, Circuit Judge:

Earl Ekas and Martin Feurer, Jr., on behalf of a class of plaintiffs who are employees of Carling National Breweries' Beltway plant, seek to enjoin the enforcement of a memorandum of understanding between Carling and Brewery Workers Local No. 1010, their collective bargaining representative. The understanding, which arose out of Carling's decision to shut down its Dillon Street plant, merges the seniority lists of the Beltway and Dillon Street plants, with the result that some of the Dillon Street employees will be able to continue working while some of the Beltway employees will be laid off. Finding that the union possessed the authority to enter into the understanding and that, by doing so, it did not breach its duty of fair representation to the Beltway employees, the district court denied the requested relief. We affirm.

I.

The facts are essentially undisputed. Since 1975, Carling has operated two facilities for the brewing and packaging of beer and other malt beverages in the Baltimore area: the Beltway and the Dillon Street plants. Although the employees at both locations were represented by the same union, Brewery Workers Local No.

1010, separate collective bargaining agreements, including separate seniority provisions, were negotiated for each plant effective July 1976. Neither agreement provided for the integration of the seniority lists of the two plants in the event of a consolidation of operations. Nor was any provision made for the amendment of the seniority terms so as to allow such integration.

In April 1978, Carling decided to close its production operations at the Dillon Street plant and to transfer at least part of those operations to the Beltway location. It was anticipated that, after the transfer, approximately 52% of the combined production at the Beltway facility would consist of products formerly manufactured at Dillon Street. To determine how the employees at each plant were to be affected by the consolidation, Carling and the union entered into negotiations and eventually adopted a memorandum of understanding. The understanding provided, inter alia, for the dovetailing of the seniority lists of the two plants on a one-to-one basis, beginning with the senior Dillon Street employee.[1] The

[1] Thus, for each department, the senior Dillon Street employee would be first on the combined seniority list, the senior Beltway employee second, the next senior Dillon Street employee third, the next senior Beltway employee fourth, and so on.

agreement also specified that employees with ten or more years seniority at either plant would be preferred over those with less than ten years seniority for purposes of layoff and recall. The Dillon Street employees, as a whole, had served Carling longer than the Beltway employees. Moreover, because the combined production at the Beltway plant was to be less than the previous output of both plants, layoffs were expected.

The memorandum of understanding was ratified at a joint meeting of the Dillon Street and Beltway employees after the Beltway employees, who claim to have been outnumbered, walked out. The Beltway employees then filed this suit, seeking an injunction against the implementation of the understanding, a declaration that the understanding is invalid, and an award of damages. In an oral opinion, the district court denied relief, and the Beltway employees appealed.

II.

This appeal raises two issues: whether the union had the authority to agree to the dovetailing of the seniority lists at the two plants, and whether, in so agreeing, it satisfied its duty of fair representation to the Beltway employees.

The original collective bargaining agreements covering the Beltway and the Dillon Street employees did not expressly provide for the integration of the seniority lists of the two plants in the event of a consolidation of operations. Nor was any power specifically given to amend the seniority terms of the agreements, so as to permit such an integration.[2] However, we think that, even in the absence of express provision, a union and an employer may assent to the modification of the terms of their existing collective bargaining agreements. This proposition is implicit in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), in which the Supreme Court upheld a contract amendment which gave World War II veterans seniority credit for pre-employment military service at the expense of other employees in

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[2] The agreements did authorize the union to negotiate with Carling with respect to "any and all differences between the parties concerning the interpretation or application" of their terms. Likewise, the union's International Constitution required it to engage in collective bargaining whenever a dispute arose between its members and their employers. Because we conclude that the union possessed the inherent authority to renegotiate the terms of the agreements, however, it will not be necessary to consider whether such authority can be derived from these general provisions as well.

the bargaining unit.[3]

The Beltway employees stress that only one collective bargaining agreement and one bargaining unit were involved in Ford, whereas here there were two agreements and two units. Since they had a separate agreement with the union, the Beltway employees suggest that the union was bound to pursue their interests to the exclusion of the interests of its other members. We find this reasoning unpersuasive. Whether the employees represented by a particular union constitute one or more units and whether they are covered by one or more agreements, the union still has the duty to represent fairly all of its members. To require it to favor one unit over another, without regard to the circumstances of the case, would make satisfaction of that duty impossible. Thus, where a union and an

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[3] Humphrey v. Moore, 375 U.S. 335 (1964), and Price v. International Brotherhood of Teamsters, 457 F.2d 605 (3 Cir. 1972), do not dictate a different rule. Unlike the instant case, those decisions dealt with the authority of an arbitration panel to dovetail seniority lists. To quote the district court: "[A]mendment is not subject to the same rule as arbitration. Since arbitration is itself a creature of the collective bargain, there is an inherent logic in preventing arbitration from adding to the contract terms. However, the same reasoning should not operate to prevent renegotiation."

employer have renegotiated collective bargaining agreements covering a group or several groups of employees, the sole inquiry should be whether, under all the circumstances, the union has considered the interests of all whom it represents.

In upholding a contract amendment granting preferential seniority rights to a particular class of employees, Ford said the following with regard to the union's duty of fair representation:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion.

345 U.S. at 338. This standard was subsequently applied in Humphrey v. Moore, 375 U.S. 335 (1964), which found no breach of the union's obligation when, as a member of a joint grievance committee, it agreed to dovetail

the seniority lists of two companies that had merged operations. Recognizing that the employees of one company or the other were going to suffer, the Court held that "[b]y choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors." Id. at 350.

Such was the case here. The Beltway employees allege no bad faith on the part of the union other than the union's failure to place their interests above the interests of the Dillon Street employees. Consideration of the interests of all its members is hardly an exercise of bad faith. Indeed, if the union had complied fully with the wishes of the Beltway employees, it would have breached its duty to represent fairly the Dillon Street workers. Nor was the union's resolution of the competing interests unreasonable. Since over half of the combined production at the Beltway plant was expected to consist of Dillon Street products, an endtailing provision putting Dillon Street employees after the Beltway employees in seniority would have been patently unfair. Likewise, a strict seniority provision would

have unduly advantaged the Dillon Street workers, who had in general served Carling longer. So the union settled upon a dovetailing of the seniority lists on a one-to-one basis with an additional provision protecting employees with ten or more years of seniority from layoff. Under the authority of Ford and Humphrey and in the circumstances of this case, the union's action was eminently reasonable.

A F F I R M E D.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL EKAS
and
MARTIN FEURER, JR., CIVIL ACTION NO. Y78-1251
vs.
CARLING NATIONAL BREWERIES INC. CLASS ACTION
and
BREWERY WORKERS LOCAL UNION NO. 1010

ORAL OPINION OF THE COURT

THE COURT: I first want to thank counsel for the very excellent attention they have given to this issue. The case was filed, as you know, on July 11th, and because of the urgency of possible action to be taken, it was determined that in lieu of a hearing on the temporary restraining order, the case would be heard on the other relief requested.

Normally, of course, as you know, it would be my intention to hear the case, and then to issue a written memorandum at a later date, but because of the time problems, I will, as

counsel have done, attempt to squeeze the items together, and give you my thoughts at this time. It is a bit lengthy, perhaps, but there are a number of issues to cover; if you will bear with me on that, I will attempt to give you my opinion on the various areas; in the event there is any further consideration of this matter, at least my reasons for the action here today will be on the record. But, as I indicated, I do thank counsel for their assistance in providing the memoranda that have been filed, and the evidence that has been introduced in the case.

Earl Ekas and Martin Feurer, Jr., on behalf of a class of plaintiffs who are employees of Carling's Beltway plant seek to enjoin the enforcement of a Memorandum and Understanding between the employer and Local 1010, their collective bargaining representative, which was reached in June of this year. The understanding arises out of the decision by Carling to cease manufacturing operations at its Dillon St. plant in Baltimore City, and, in particular, plaintiffs, who are members of the Brewing, Bottling and Mechanical Departments at the Beltway plant of Carling, located in suburban Baltimore, challenge the

seniority provisions of the Understanding, as a violation of their collective bargaining agreement. Plaintiffs claim that the union has no authority to alter the existing agreement, and that the union breached its duty of fair representation by agreeing to the terms of the Understanding.

Defendants contend that the union has authority to amend the collective bargaining agreement, as it did through the Understanding, and that its decision, as to terms, was as equitable as possible, under the circumstances, and is not a breach of the union's duty to fairly represent all employees.

The following things seem to be apparent and undisputed: The Understanding does in fact change the seniority terms of the plaintiffs' prior agreement, that the work which will be done at the Beltway after Dillon St. manufacturing operation closes will include some work previously done at Dillon St., that the total work will not be sufficient to employ all who were formerly employed at both plants, and that the seniority terms will, accordingly, have immediate impact over the next few weeks or months as to which employees are laid off and which retain their jobs. It is also undisputed that Dillon St.

employees, generally, have been with the company longer, so that the effect of a plan which places both plants' employees in one list strictly by seniority would be more favorable to the Dillon St. employees, whereas a plan which "endtailed" the Dillon St. employees, by placing them after the Beltway employees for seniority purposes would be more advantageous to more Beltway employees. Although the exact figures are not clear, there are certainly Beltway employees with more seniority than some Dillon St. employees; however, the overall effect of combining the two groups will be that more Dillon St. employees will retain jobs after the layoffs. This combining of seniority lists is generally known as "dovetailing".

Having reviewed the case law, the memoranda, the affidavits submitted and the evidence introduced at the first hearing of this case, and having heard counsel, it is clear that the union had authority to modify the seniority provisions of the collective bargaining agreement, despite the lack of specific authorization in the contract terms; further, that the system of "dovetailing" is generally acceptable unless it was reached in violation of the union's duty to represent all employees,

and that the plaintiffs have not shown facts which would amount to a violation of this duty; further, that the defendant employer, Carling, is liable only if the union has breached its duty of fair representation, but that if there is such a breach, the employer is also a proper defendant, even if it had no role in the unfairness. Further, the motions made at the time of the first hearing by the Dillon St. employees, a Motion to intervene, was previously granted, allowing them to appear as intervenors.

The findings of fact and conclusions of law that are made in connection with this oral opinion are made in accordance with the requirements and provisions of Rule 52 of the Federal Rules of Civil Procedure, whether or not specifically designated.

The factual background in this case does not really seem to be in dispute. Prior to 1975, the Dillon St. plant was an operation of the National Brewing Company, and the Beltway plant was part of the Carling Brewing Company, Inc. The two merged into the defendant company in 1975. Both before and since the merger, the defendant union, Local 1010 Brewery Workers, was, and is, the recognized collective bargaining unit for both plants.

The union negotiated a separate agreement

with Carling as to each plant. In each case, the effective dates are July 1, 1976 to June 30, 1979. The seniority provisions of each agreement are contained in Article I, Section 4. The terms of the seniority provisions are substantially the same for purposes of resolving the issues involved in this litigation. Each defines seniority for the Brewing, Bottling and Mechanical Departments as "departmental seniority". The most important matter determined by seniority for present purposes is the order of layoffs, but it affects other issues such as choice of vacation times.

Clearly, these contracts envisioned separate seniority lists at each plant. Further, no contract provision either specifically described what should be done in connection with seniority in this situation, or in general terms empowers the union to modify the seniority terms. Accordingly, this is not a case where the rights of the union to amend can be based on the bargaining agreement itself.

One prior Understanding between the Local and Carling modifies both agreements as to a seniority provision. It was negotiated when both plants were intended to remain operative, and provides that employees laid off at one plant will have first claim on jobs at the other, as

compared with outsiders, in the order of their seniority at the plant which laid them off. However, the system is an "endtail", in that Dillon's layoffs would be hired at Beltway only after Beltway had recalled all its own seniority people, and, of course, the plan is worked just the opposite in the event of a layoff at the Beltway.

The seniority provisions of the June, 1978 Understanding, at issue here, is a form of "dovetailing," but with some special features. The two previously separate agreements are combined. For seniority purposes, the departmental concept is preserved, but there will be one list for each department. The method for combining is set forth at page 3 of the Understanding, which is Exhibit No. 5 to the complaint, and I quote:

"The senior employee on the Dillon St. list will be first on the combined lists; the senior employee on the Beltway list will be second on the combined list; the next senior employee on the Dillon St. list will be third on the combined list; the next senior employee on the Beltway list will be fourth on the combined list; alternate selection from each plant list on a one-to-one basis in accordance with seniority will continue as described

above until every employee is ranked on the combined list."

For layoff and recall, the combined seniority list for each department will be used, with the proviso that, and I quote:

"... employees with 10 or more years of seniority will be preferred over employees with less than 10 years of seniority for purposes of layoff and recall. For example, if a layoff becomes necessary in the Bottling Department, and if the number 100 employee has 11 years of seniority, and the number 90 employee has nine years of seniority, the number 100 employee will remain and the number 90 employee will be laid off."

As referred to on page 5 of the Understanding, which is, as I have indicated, Exhibit No. 5.

In short, this particular variation on dovetailing is less favorable to Dillon St. employees, who are generally older, than a strict seniority system combining the two lists would be, but far superior to endtailing, which would be highly advantageous to Beltway employees.

The Memorandum of Understanding was ratified at a joint meeting of the Dillon Street and Beltway employees, after the Beltway employees, who claim to have been numerically

outnumbered, walked out.

While plaintiffs do not dispute that considerable Dillon St. work is going to the Beltway, they argue that the only acceptable principle is to transfer Dillon St. employees strictly according to the work going over, and that the Plan, which to be implemented, wrongly uses years of service, rather than "following the work" as the standard for who keeps a job.

The defendants contend that consolidation will result in more than 50 per cent of the combined production at Beltway being products formerly done at Dillon St., and claims that plaintiffs' desire for an endtail-type solution, without regard to length of service of Dillon St. employees, would be a windfall of additional jobs to Beltway workers, as a result of the transfer of work.

I will discuss now the various legal principles, and the first one is the question of exhaustion of remedies, which is a threshhold question. The company has indicated it makes no issue of this; the defendant union does not waive any rights it has as to this issue.

The collective bargaining agreement negotiated in 1976 provides for a grievance procedure and arbitration. In the instant case, it is

agreed that the issue has not gone to arbitration. Defendants apparently agree that the grievance has not yet been processed, although the plan is to take effect in a few days.

The applicable standards for exhaustion are set forth in Vaca v. Sipes, 386 U.S. 171, in 1967, which holds that: "the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." That is at page 184. See, also, Republic Steel Corp. v. Maddox, 379 U.S. 650.

However, since the remedy procedures are often controlled by the union and the employer, an individual employee, or presumably a class as here, should not be precluded from coming to court when the contract methods are futile for him. As examples, the Court cited the situation where the "conduct of the employer amounts to a repudiation of those contract procedures." Referred to in the above Vaca v. Sipes at page 185, where the Court said:

"In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the exhausted grievance and arbitration procedures as a defense to the employee's cause of action."

The Court also speaks of a wrongful refusal of the Union to process a grievance.

In the instant case, there is a factual dispute as to whether the Union has simply not finished processing the grievance, or whether it is wrongfully refusing to process it.

In summary, however, even if there is no improper motivation, the delay in processing, where time is of the essence, should work an estoppel as to the Union.

In summary, where the Union and employer have reached agreement, it is difficult to see how the arbitration process can be invoked to aid the dissatisfied employee, at least as the facts are presented in this case. Accordingly, further exhaustion should not be required.

Going, then, to the next issue in the case, and referring to Humphrey v. Moore, to which counsel for both Plaintiff and the Intervenor have referred to, cited at 375 U.S. 335, in 1964, the Supreme Court upheld an arbitration decision approving dovetailing. In that case, the same Union represented two transportation companies, one referred to as Dealers, and the other E & L; each involved, in part, in transporting new automobiles for Ford Motor Company. For purposes of concentrating the activities of each in a different area, E & L was to withdraw from a

southern area. Although there was no contract right to transfer, and the transaction between the companies did not involve any trades or exchanges of property, the E & L employees claimed that they should be taken on at Dealers, with the seniority right they had enjoyed at the former employer, by a method of combining the seniority lists of the companies. The Joint Conference Committee, on arbitration, adopted this method. Since E & L was the older company, the effect was the layoff of Dealers' employees, who claim that the collective bargain did not authorize dovetailing, and that the Union had breached the duty of fair representation. The Supreme Court disagreed. As to the authorization, it found that a contract provision gave the arbitrator flexibility to make equitable arrangements. The Court then held that the Union's contract did not breach the duty of fair representation, since the Union took its position "honestly, in good faith and without hostility or arbitrary discrimination." At page 350. Stressing that conflict among different employees in the same Union is a fact of life; the Court characterized the problem and set forth the standard of conduct for the Union, and I quote:

"After Dealers absorbed the Louisville

business of E & L, there were fewer jobs at Dealers than there were Dealers and E & L drivers. One group or the other was going to suffer. If any E & L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the Union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the Union of its duty of fair representation."

This quote being at page 350 of the opinion.

In Price v. International Brotherhood of Teamsters, 457 F.2d 605, decided by the Third Circuit in 1972, the rationality of dovetailing, when a company closed one facility and workers were transferred to another terminal, was also upheld. The contract called for endtailing in such transfers, but another provision allowed the Union and the company to choose an alternate solution when necessary. Based on the contract, the dovetailing was upheld, but the Court viewed Moore as holding that Union and management cannot amend the contract. The Court reasoned that arbitrators have base awards on

the existing contract, citing United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, decided in 1960, and said, of Moore:

"...(it) rejected the view adopted by Mr. Justice Goldberg that the Union and management had the power to amend the contract. Mr. Justice Goldberg's formulation stressed the needs of the bargaining parties in the administration of the contract to be free to change the contract, even to the extent that such amendment may encroach on the 'vested' rights of the individual employees. The majority adopted a more traditional approach and required the parties to operate within the confines of the collective bargaining agreement. Although it affirmed the finding of the Joint Area Committee, it did so only after making a determination that the interpretation involved was reasonable in the light of the contractual language."

Again, citing that case, the Price case at 457 F.2d at 610; Accord Walters v. Roadway Express, Inc., 557 F.2d 521, Fifth Circuit in 1977.

The cases that I have referred to, those of Moore, Price, and Walters all involved the Court in review of what were essentially

arbitration decisions. The present case is different, not in terms of the reasonableness of the dovetailing decision, as to which the case law is directly on point, but as to the authority to make that decision. In the instant case, the authority is not based on the contract itself. But, this is not a case of reviewing an arbitration decision, but a case where the employer and the Union have chosen to amend the contract.

In Masullo v. General Motors Corp., 393 F.Supp. 188, District of New Jersey in 1975, the Union and employer executed a Memorandum of Understanding, as here, amending a contract to provide for dovetailing. The Court found authority for such action in the original contract which, in general terms, authorized search for an equitable solution to transfer problems. The Court also upheld the grievance procedure decisions which worked out the problem.

In the case now for consideration, there is no contract provision covering transfer, and no general power to amend. The issue, then, becomes whether Moore prevents re-negotiation, or whether there is an inherent power to renegotiate terms of a collective bargain, even where the contract is silent.

In a footnote in Moore, the Court states as follows:

"We need not consider the problem posed if Section 5" and Section 5 said in mergers or absorbtions, the affected employees should be determined by mutual agreement between the parties and the Union involved, "had been omitted from the contract or if the parties had acted to amend the provision. The fact is that they proported to proceed under the Section. They deadlocked at the local level and it was pursuant to Section 5 that the matter was taken to the Joint Conference Committee which, under Article 7, was to make a decision 'after listening to testimony on both sides.' The Committee expressly recited that its decision was in accordance with Section 5 of the contract. Even in the absence of Section 5, however, it would be necessary to deal with the alleged breach of the Union's duty of fair representation."

That quote being at 375 U.S. at 345.

In short, Moore leaves the present issue open. If the language in the Third Circuit cases cited above suggests that the parties cannot amend the contract in connection with seniority, this Court does not see fit to follow that lead. While it seems clear that

arbitrators, as the Joint Conference Committee was in Moore, must stay within the essence of the contract, the Union and management are not prevented from renegotiating that contract. In short, amendment is not subject to the same rule as arbitration. Since arbitration is itself a creature of the collective bargain, there is an inherent logic in preventing arbitration from adding to the contract terms. However, the same reasoning should not operate to prevent renegotiation.

The inherent ability of the Union and management to renegotiate is well recognized, and Moore is not viewed as overruling it. There is a general summary of this in 90 ALR 2d at page 975.

In Fagan v. Pennsylvania Railroad, decided by the Middle District of Pennsylvania in 1959, reported at 173 F.Supp. 465, the Railroad and the Brotherhood revised a collective bargaining agreement which had set up two separate seniority districts, and merged the two into a single district with a single seniority roster. Noting that the only agreements revising seniority which Courts had set aside involved a loss of seniority rights for blacks, the Court stated, and I quote:

"It has been firmly established that

seniority is a contract right, arising solely from contract and subject to change with the contract, and that an employee has no inherent right to seniority in service."

At page 470, citing also Elder v. New York Central, 152 F.2d 361, a Sixth Circuit case in 1945.

The power of the Union and employer to execute supplementary agreements during the life of a contract, which affects seniority, is implicit in Ford Motor Co. v. Huffman, decided by the Supreme Court and reported at 345 U.S. 330, which also demonstrates the broad latitude accorded to officials who act in good faith. There, Ford and the International executed a supplementary agreement to the effect that employees would be given credit for pre-employment military service in computing seniority. The Selective Training and Service Act of 1940 required the employer to give credit for post-employment service, but not pre-employment service. The Court agreed that workers without military service and workers with post-employment service would have their seniority adversely affected by the decision to credit pre-employment service, but upheld the modification. The Court also made it plain that the Union must

consider the interests of all employees, but that an agreement which favors some more than others inevitably results from bargaining and does not, without more, provide a breach of that duty.

There is a statement of the Court at page 338, which is rather lengthy, but which indicated complete satisfaction of all of who are represented is hardly to be expected. It goes on, that quote, and is relevant to the issues of fact in this case.

In Carpenter v. Brady, 241 F. Supp. 679, Southern District of Minnesota in 1965, which is directly on point, the contract called for the different docking facilities of the Duluth, Missabe and Iron Range Railroad to maintain separate seniority rosters. However, when one dock closed, the Brotherhood and the employer negotiated an amendment to the basic agreement, calling for dovetailing of seniority rosters on a one-for-one basis. Although the contract did not provide for such an option, the court stated that the union's policy of "follow the work" where jobs shift from one site to another is fair, and that the defendants had not breached the duty of fair representation, stating:

"... the general policy ... is fair and

equitable whether it has specific application here or not. Men with seniority are normally those of more advanced years. They will find it increasingly difficult to secure employment at other jobs. If their jobs are moved, they should be allowed to follow them and not be barred by the seniority system in the transferee district."

That quote is cited at page 682.

The plaintiffs cannot differentiate themselves from the above cases. They stress that in this case there were two separate contracts, not one. However, the Court is satisfied that this is a distinction without merit. The overall scenario is the same. One company is involved (as indicated by the above cases, the ability to dovetail is sanctioned even where different companies are involved), there is one union, the firms are in the same area, and the work is being transferred.

There is no case law that suggests that the "follow the work" concept is the only basis for authorizing dovetailing. While the equitableness of dovetailing does seem to inherently involve the idea of work going over to the other location, mathematical precision is not required, as indicated in Masullo v. General Motors, above. Whether it is essential

need not be decided under the facts of this case, since it is undisputed that work is being transferred. The affidavit of William Boden, Vice President for Employee Relations of Carling, gives a narration of Carling's expectations about the work transferred and the impact of the agreement on the labor force of both plants. From the evidence in this case, plaintiffs do not really oppose these figures, but simply argue that dovetailing and amending is not proper, because there were two separate contracts, and Beltway employees should not have their rights and expectations changed.

Plaintiffs have failed to show why dovetailing is unfair or that it was done in bad faith. The plaintiff, Feuer, does suggest that the union wished to accomodate the employees at Dillon St., who, as a majority, have more voting power than Beltway employees. This alone is not a showing of improper behavior, or bad faith. Again, the power of unions to reconcile the competing interests of their members is unquestioned, and the choices made will be respected unless there is proof of arbitrary, discriminatory, or bad faith conduct, as indicated in Masullo v. General Motors cited above.

In negotiation, the union necessarily must at times sacrifice some interests for the greater good. Steele v. Louisville & Nashville Railroad, 323 U.S. 192, decided by the Supreme Court in 1944.

The plaintiffs cite Local 1251, UAW v. Robertshaw Control Co., 405 F.2d 29, decided en banc by the Second Circuit in 1968 for the proposition that seniority provisions at one plant do not survive the contract. In that case, the plaintiffs in Lux's Connecticut plant were laid off when departments were transferred to a Tennessee plant. Different unions were involved. Although the Connecticut employees' contract did not provide for seniority rights at other plants, the Connecticut employees asserted such rights. However, this case and others cited therein simply indicate that employees cannot claim seniority rights not based in contract. It in no way suggests that contracts cannot be amended by union and employer as to seniority. In fact, the underlying rationale for finding that the employees in Lux could not insist on seniority dictates the opposite result in this case. The Court there stated, and I quote from page 33:

"Seniority is wholly a creation of the

collective agreement and does not exist apart from that agreement. The incidents of seniority can be freely altered or amended by modification of the collective agreement."

Since the union has not breached its duty of fair representation by amending the contract, no action for breach of contract will lie against the union or the employer.

In summary, the law clearly authorizes union and employer to amend collective bargains as to seniority, and strongly supports the technique of dovetailing, where plaintiffs have failed to show specific reasons why it is an arbitrary or bad faith solution under the facts of this case. For those same reasons, that is, the wide latitude allowed unions to balance the competing interests of members, the Dillon St. employees, having intervened, also have no basis for complaint for failure to choose an absolute merger according to seniority.

This, then, as I have indicated, will be the findings of fact and the rulings of law in accordance with the provisions of Rule 52, whether or not so specifically indicated, and I will ask counsel to agree upon an order, and when submitted, I will sign it promptly.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL EKAS

and

MARTIN FEURER, JR.

vs.

CARLING NATIONAL BREWERIES, INC. — CIVIL ACTION NO. Y-78-1251

and

BREWERY WORKERS LOCAL UNION NO. 1010

* * * * * * * * * *

ORDER

Whereas, this action came on to be heard on Plaintiffs' request for a Preliminary Injunction, and the Court having considered the pleadings, the memoranda, the affidavits and the depositions filed herein, and having taken testimony and heard argument of counsel for the parties in open court, and the Court having stated orally its findings of fact and conclusions of law, it is this 1st day of August, 1978,

ORDERED that said request for a Preliminary Injunction be and the same is hereby denied.

Further, whereas the parties have informed the Court and have stipulated by the signatures of their counsel below that no

additional pleadings, evidence or argument will be submitted by the parties for consideration by the Court in rendering a final judgment on Plaintiffs' Amended Complaint and the relief requested therein and that the parties request a final judgment by the Court at this time and it therefore appearing that the aforesaid findings of fact and conclusions of law will apply with equal force to the final judgment of this Court, it is also this 1st day of August, 1978 further

ORDERED, ADJUDGED, DECREED AND DECLARED:

(1) That Plaintiffs' request for a Permanent Injunction be and the same is hereby denied; and

(2) That final judgment be and is hereby entered for Defendants on Plaintiffs' prayer for damages; and

(3) That the Memorandum of Understanding, dated June 23, 1978, entered into by Defendant Carling National Breweries, Inc. and Defendant Brewery Workers Local Union No. 1010 is valid and has full force and effect, and that the legal rights, relations and obligations of the parties hereto as they relate to the seniority rights of the employees of Defendant Carling National Breweries, Inc. who are represented

for collective bargaining purposes by Defendant Brewery Workers Local Union No. 1010 shall be governed by said Memorandum of Understanding.

/s/ Joseph H. Young
United States District Judge

Agreed to as to form:

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Edward J. Gutman

Rochelle S. Eisenberg

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL EKAS

and

MARTIN FEURER, JR.,

vs. CIVIL ACTION NO.
Y-78-1251

CARLING NATIONAL BREWERIES INC.

and

BREWERY WORKERS LOCAL UNION NO. 1010

* * * * * * * * * * * *

ORDER

It appearing that Plaintiffs Earl Ekas and Martin Feurer, Jr., seek to maintain this action as a class action, and upon consideration of all the pleadings, evidence and argument presently before this Court in this matter, whether presented by Memorandum, affidavit, deposition or orally at hearing on this matter in open Court, and the Court having found pursuant to Fed. R. Civ. P. 23(a) that: (1) Plaintiffs' class, consisting of all individuals employed by Defendant Carling National Breweries, Inc. at its Beltway Plant, who are represented for collective bargaining purposes by Defendant Brewery Workers Local Union No. 1010, is so numerous that joinder is impractical; (2) there are questions of law or fact common to plaintiffs' class; (3)

the claims of the class representatives are typical of the claims of the plaintiffs' class; and (4) the representative parties will fairly and adequately represent the class interests, and the Court having further found pursuant to Fed. R. Civ. P. 23(b)(2) that the parties opposing the class have acted or refused to act on grounds generally applicable to the plaintiffs' class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole, it is

ORDERED in accordance with the Court's authority under Rule 23(c) of the Federal Rules of Civil Procedure, that the aforesaid class of individuals is certified, with the named Plaintiffs Earl Ekas and Martin Feuer, Jr. as representatives of this class in this action.

Dated: August 1, 1978

/s/ Joseph H. Young
United States District Judge

Agreed to as to form:

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL EKAS

and

MARTIN FEURER, JR.,

vs. CIVIL ACTION NO.
Y-78-1251

CARLING NATIONAL
BREWERIES, INC.

and

BREWERY WORKERS LOCAL
UNION NO. 1010

* * * * * * * * * * *

ORDER

It appearing that William J. Farley seeks to intervene in this action as the representative of a class of all individuals employed by Defendant, Carling National Breweries, Inc. at its Dillon Street Plant who are represented for collective bargaining purposes by Defendant Brewery Workers Local Union No. 1010, and upon consideration of all the pleadings, evidence and argument presently before this Court in this matter, whether presented by memorandum, affidavit, deposition or orally at hearing on this matter, and the Court having found pursuant to Fed. R. Civ. P. 23(a) that: (1) Intervenor's class is so numerous that joinder is impractical; (2) there are questions of law or fact common to

intervenor's class; (3) the claims of the class representative are typical of the claims of the intervenor's class; and (4) the representative party will fairly and adequately represent the class interests, and the Court having further found pursuant to Fed. R. Civ. P. 23(b)(2) that the parties opposing the class have acted or refused to act on grounds generally applicable to intervenor's class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole, it is

ORDERED in accordance with the Court's authority under Rule 23(c) of the Federal Rules of Civil Procedure, that the aforesaid class of individuals is certified, with William J. Farley as representative of this class in this action.

Dated: August 1, 1978

/s/ Joseph H. Young
United States District Judge

Approved as to form:

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Leonard E. Cohen

Edward J. Gutman

Neal Serotte

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